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CASES

Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123, et al., #409 March 27, 1944,____U. S.____

IN THE

Supreme Court of the United States

October Term 1943

Number.....

LOCAL No. 6167
UNITED MINE WORKERS OF AMERICA,
AN UNINCORPORATED ASSOCIATION
AFFILIATED WITH THE INTERNATIONAL
UNION, UNITED MINE WORKERS
OF AMERICA, ET AL.,

Petitioner.

Versus

JEWELL RIDGE COAL CORPORATION,
A CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable Chief Justice and the Associate Justices Of The Supreme Court Of The United States:—

The petitioners are as follows: Local No. 6167, United Mine Workers of America, an unincorporated association, affiliated with the International Union, United Mine Workers of America; Harlan Hampton, President, John A. White, Vice President, Omer Ketron, Recording Secretary, James W. Belcher, Financial

Secretary, C. M. Mathena, Treasurer, Tony Farnese, Door Keeper, Individually and as Officers of said Local No. 6167; Carl Altizer, Omer Ketron and T. V. White, Individually and as members of the Mine Committee of said Local No. 6167; H. D. Hampton, Tony Farnese, and James Al Smith, Individually and as members of the Safety Committee of said Local No. 6167; Local No. 7327, United Mine Workers of America, an unincorporated association, affiliated with the International Union, United Mine Workers of America; J. H. Sheppard, President, J. E. Collins, Vice President, Forrest Ritchie, Recording Secretary, Josh Keen, Financial Secretary, C. F. Clark, Treasurer, Lyss Patrick, Door Keeper, Individually and as Officers of said Local No. 7327; Josh Keen, J. A. White and Paul Sykes, Individually and as Members of the Mine Committee of said Local No. 7327; Walter Jackson, J. S. Walker and Glenn Crouse, Individually and as Members of the Safety Committee of said Local No. 7327; District No. 28, United Mine Workers of America, an unincorporated association, affiliated with the International Union, United Mine Workers of America; John Saxton, President and W. F. Minton, Secretary-Treasurer, Individually and as Officers of said District No. 28, and International Union, United Mine Workers of America, an unincorporated association and John L. Lewis, individually and as President of said International Union.

The petitioners pray that a Writ of Certiorari issue for the purpose of securing a removal to this Court of the case in which the petitioners are appellants in the Circuit Court of Appeals for the Fourth Circuit to review a judgment of the United States District Court for the Western District of Virginia, entered on the 25 day of January, 1944. Said Circuit Court of Appeals has not given a judgment or decree.

A transcript of the record in the case including the proceedings in said court, is furnished herewith in accordance with the rules of this Court.

JURISDICTION

The jurisdiction of this Court is based on Section 240 (a) of the Judicial Code, 28 U. S. C. A. Section 347, as amended by the Act of February 13, 1925.

SUMMARY AND SHORT STATEMENT OF THE MATTERS INVOLVED.

This case raises the question of portal-to-portal pay under the Fair Labor Standards Act of 1938 for underground employees in two coal mines of the Jewell Ridge Coal Corporation. That corporation brought a class action against the petitioners in the District Court of the United States for the Western District of Virginia asking for a declaratory judgment under the provisions of the Federal Declaratory Judgment Law, Title 28 U. S. C. A. Section 400, the Judicial Code, Section 274 (d).

The complaint alleged that the plaintiff had at all times effective wage agreements which provided that seven hours of labor should constitute a day's work and that the seven-hour day meant seven hours work in the mines at the usual working places.

The plaintiff asked the Court to declare among other things that:

"(a) Plaintiff, in computing the workweek of its underground employees on the basis of hours of work in the mines at the usual working places, exclusive of the lunch period and travel time, as provided in the effective wage agreements, and in paying its underground workers for their services on that basis, had complied with and

discharged the obligations imposed upon it by Section 7 of the Fair Labor Standards Act.

(b) Section 7 of the Act does not require that there be included within the workweek of underground workers in plaintiff's mines time spent in travel from the portal to their usual working places and return."

The petitioners herein, being all of the defendants in the action, filed a detailed answer to the complaint. The answer denied that there were any wage agreements covering the time subsequent to March 31, 1943. The answer further asserted that the underground employees of the plaintiff had been employed for workweeks longer than those prescribed in Section 7 of the Fair Labor Standards Act of 1938 and that they had not been paid therefor as required by the Act.

Those defendants who were underground employees of the plaintiff filed a counterclaim in behalf of themselves, and all other employees similarly situated, claiming for the entire period subsequent to the effective date of the Act the overtime compensation, the liquidated damages and the attorney's fee provided by the Act. Before the trial began, however, the underground employee defendants filed an amendment to their answer disclaiming all overtime compensation and liquidated damages except for the period April 1, 1943 to June 20, 1943.

The complaint alleged that the workers employed in the Jewell Ridge mine consumed on an average for each man approximately 88 minutes each working day in traveling from the mine portal to the usual working places and thence back to the mine portal, and in like manner the workers employed in plaintiff's Jewell Valley mine consumed on an average for each man approxi-

mately 67 minutes. The answer admitted that the travel time was at least as great as the figures given in the complaint and charged upon information and belief that it was somewhat in excess of those figures.

It was stipulated and agreed by all parties in a pretrial order entered by the District Court that the issues to be tried in the action were as follows:

"(a) What constitutes the working time which makes up the workweek of plaintiff's underground employees within the meaning of Section 7 of the Fair Labor Standards Act of 1938, and what amounts, if any, are due and unpaid to such employees under said section, the determination of such amounts, if any, to be later referred to a special master."

"1. In reference to 'a' above, the plaintiff contends that such workweek does not include that portion of the time spent by its underground employees in being transported or walking to and from their usual working places."

"2. In reference to 'a' above, the defendants contend that such workweek includes all the time from the time such employees are required to report and do report for work at the portal of the mine until they return to the portal at the end of the shift, less the regular lunch period, when they are relieved of all duties."

On January 25, 1944, the District Court entered a judgment in which it was adjudged, ordered and declared:

"1. That the Fair Labor Standards Act of 1938 does not require that there be included within the workweek of underground workers in plaintiff's mines, either time spent by such employees outside the portal of the

mines before entering therein, or time spent in traveling from the portals to their usual places of work and return; and

"2. That plaintiff, in computing the workweek of its underground employees on the basis of hours of work in the mines at their usual working places, exclusive of the lunch period, and the time spent outside the portals, and traveling time from the portals to their usual working places and return, as provided in the effective wage agreement and continuations thereof, and in paying its underground workers for their services on that basis, has complied with and discharged all its obligations imposed upon it by the Fair Labor Standards Act of 1938."

The District Court further adjudged that the defendants were entitled to recover nothing on their counterclaim for overtime compensation under the Fair Labor Standards Act and dismissed the counterclaim at the cost of the defendants.

From the judgment entered the petitioners herein took appeal on April 12th, 1944, to the United States Circuit Court of Appeals for the Fourth Circuit. That appeal is now pending, and the United States Circuit Court of Appeals for the Fourth Circuit has not given a judgment or decree, and the appeal has not been heard and submitted in that Court.

The opinion of the District Court, including findings of fact and conclusions of law, is set forth in the appendix. It is also reported in 53 Fed. Sup. 935.

STATEMENT AS TO OPERATIONS OF THE MINES.

So far as we have been able to determine there is no dispute in the evidence as to a single essential feature of the mining operations. The plaintiff operated Jewell

Ridge and Jewell Valley coal mines in the Western District of Virginia employing 500 and 400 men respectively. At Jewell Ridge when the coal is mined out under one ridge the operation follows the seam into the next ridge so that the track on which the coal is hauled to the tipple comes out of the openings in passing from ridge to ridge. These openings make convenient places of entry for some seventy-two miners who live on top of the ridges and have poor and at times impassable roads from their houses to the main portal. All other miners at Jewell Ridge and all miners at Jewell Valley enter at the mouth of the mine. Those who live in company houses walk or ride to the mine mouth as they please. Those who live a great distance are hauled free to the mine mouth in busses furnished by the company or make their own transportation arrangements.

Each underground employee carries with him into the mine his dinner and his supply of drinking water for the day. The mines have no water system. Each underground employee is required to carry an individual lamp to light his way or place in the mine. The lamps are electric battery lamps and the batteries weigh about five pounds. The light is fastened to the miner's cap and the battery to his belt.

The first thing all underground employees do upon arrival at the mine mouth is to get their lamps and batteries from the lamp house nearby. They then engage in various activities dependent upon their classification, before entering the mine.

(*a*) *Machinemen.*

Those machinemen who have motors, first get their motors out of the yard and switch them to the sand house where they fill four sand boxes holding approxi-

mately two bushels of sand, and oil the motors. They get two gallons of oil from the oil house, approximately 50 pounds of machine bits from the blacksmith shop, and such other equipment as may be necessary, including at times, rope, fingers for the starting box, and jack pipes. Those who have motors, load these supplies and equipment on to their motors. Those machinemen who do not take motors into the mine ride mantrips and load their supplies and equipment on to the tool car of the mantrip on which they ride.

(*b*) *Motormen and Brakemen.*

Motormen and brakemen go through the same process of getting oil and sand for their motors as that followed by the machinemen. Motors are brought out of the mine at the end of each shift for the purpose of being sanded, oiled and occasionally repaired.

(*c*) *Trackmen.*

Trackmen get from the blacksmith shop such tools as they may have brought out for repair. If bolts and spikes are needed, they get them in kegs weighing approximately 200 pounds and load them into the tool car on the mantrip on which they ride. Some of the trackmen take in steel cross-ties and, once or twice a month, a number of angle bars.

(*d*) *Bratticemen.*

Bratticemen carry from the supply house to the tool car on the mantrip eight or nine pounds of nails, and as needed, cement, bolts, wrenches, plaster, and rolls of brattice cloth. The latter weigh between 60 and 100 pounds.

(*e*) *Wiremen.*

Wiremen load on to the tool car each day their usual small tools, Stillson wrenches, hammers, chain blocks, "comealongs", wire splicers, drills, hack saws, hatchets, braces and bits, clip wrenches, and bell wrenches. Copper wire in lengths of 100 feet or more, blow torches and solder are taken in as needed.

(*f*) *Coal Loaders.*

The coal loaders, constituting the most numerous class of underground employees, take from the blacksmith's shop to the tool car, some four or five times a month such of their working tools as they may have brought out of the mine for repairs. Their tools consist of picks, shovels, augers, breast plates, tamping bars, wedges, axes and saws.

(*g*) *Services Continue in Transit.*

Each employee follows through to its destination, whatever he may have loaded into a tool car or on to a motor. When the tool car reaches its terminus the employee sees that his tools, equipment and supplies are unloaded and, in most instances, carries them himself to the place at which they are to be used.

THE UNDERGROUND JOURNEY.

The distances from the main portal or drift mouth to the rooms in which the coal is mined are so great that the use of mantrips to haul the men to mantrip stations is necessary to the successful operation of the mines. At Jewell Ridge, the distances from the portal to the various mantrip stations range from 4250 feet to 25,460 feet. At Jewell Valley the distances vary from 4600 to 14,450

feet. The mantrips are made up of coal cars used for hauling coal out of the mines, and are pulled by electric motors.

The mantrips are organized, operated and supervised by the company (R-225-226). They run on schedules fixed by the company (R-225). They move out on the order of company dispatchers. A foreman rides each mantrip. The men are under the control of this company foreman. He sometimes gives work instructions during the ride. He sees to it that the men sit on the side of the car away from the trolley wire. No more than seven men are allowed to ride on a car. A separate tool car is provided on each mantrip. No man is allowed to carry any tool into the car with him. The rules of the company adopted in conformity with the mining laws of the State of Virginia contain eleven separate safety rules relating to mantrips, five of which deal with the conduct of the men while on the mantrips (R-493-494). Failure to observe a rule carries a warning for the first offense, two days' layoff for the second offense and five days' layoff or discharge for the third offense (R-494).

If a man misses a mantrip, the company always provides some means for him to get to work (R-227). Furthermore, no walkways are provided along the main haulageways. The track in those haulageways is cluttered with coal.

UNDERGROUND HAZARDS.

The coal seams in the two mines vary in thickness from 32 to 54 inches. In some places the cross-collars supporting the roof are so low they scrape the coal off the cars as they are being hauled out. In places the men could ride or walk erect but, for the greater part of the ride, they sit bent over or stooped, and after leaving the

main haulageways they must, in places, bend far over or else get down on the mourner's bench of the coal car in order to avoid injuries from contact with the roof. They run the risk of falling rock or slate, of broken trolley wires, and of wrecks occurring on the mantrip.

Coal mining is a hazardous occupation (R-164). There is a greater hazard in working underground than outside (R-165). The overall picture of the dangers and the necessity for unceasing vigilance is graphically portrayed in the language of the State Mine Inspector of Virginia (R-499–503) and of the witness Tetlow (R-325–326; 359–361). Statistics for the year 1941 show that approximately one man out of every ten engaged in coal mining in the United States was injured during that year (R-333).

The District Judge found that, in view of those statistics, injuries in plaintiff's mines on mantrips were surprisingly few in number and extent. The evidence disclosed that two men had been killed, one man had received a broken back, another had received injuries to his back, while another had his ribs broken; one man had been burned by a broken trolley wire while riding a gathering motor, and four other men had received injuries. The Company kept no record of injuries unless the accident was compensable, i. e., the workman lost seven days from his work.

After leaving the mantrip at the mantrip stations, the coal loaders in Jewell Ridge pick up the powder they will need for the day, get such tools as they brought in from the outside, and carry the tools, powder, lamp, and their drinking water for the day, as they walk to their usual working places.

The distances walked vary from about 500 feet to about 1500 feet. The roof is lower than it is in the haulageways, and the workmen must walk in many places in a stooped position or all bent over (R-372). In places, the back of a man scrapes the roof as he walks and thereby wears out the top of his jacket (R-462). When a man learns to walk in that low coal, he walks with his hands as much as his feet. (R-270)

While walking in the mines, the men must be on the alert to avoid injuries from tram trips catching them in narrow places. They must also avoid contact with the exposed trolley wire. Because of this danger, a rule of the company forbids the men to carry tools on their shoulders.

The exit from the mines at the end of the shift is substantially a reverse process of the entrance into the mines. They bring to the powder station unused powder, and such tools as need repair.

The mantrips at Jewell Ridge start running at seven a. m. and follow one another not closer than 500 feet. Pay time starts at eight o'clock. At Jewell Valley the mantrip starts at seven thirty a. m. and pay time starts there at eight o'clock.

DECISION OF THE DISTRICT JUDGE.

The District Judge did not make any finding of facts contrary to the facts above enumerated. His findings include general statements, such as the following: "Employees leave the trains at the 'mantrip stations' which are nearest to their respective places of work, and walk the rest of the way."

"After securing their lamps, various men do various things before taking the mantrip. .....These

preliminary activities require variously from three to ten minutes."

CUSTOM, COLLECTIVE BARGAINING, AND ADMINISTRATIVE RULING.

The District Judge devotes more than half of his findings of fact to a discussion of these three subjects which are concerned with "face to face" method of computation. His findings omit mention of the second Illinois Agreement (Pl. Ex. #40 - R. 779-785), and the Ickes-Lewis Agreement of November 3, 1943 (Pl. Ex. #41 - R. 793-795). These two agreements recognize that coal miners are entitled to pay from portal to portal. It is also clear that during the time in question, April 1, 1943 to June 20, 1943, the miners were working pursuant to a telegram from the President of the United States (Pl. - Ex. #29 R - 708), in the expectation that any contract obtained would be retroactive to April 1, 1943.

It is not in the record, but it is a matter of common knowledge, and worthy of mention here, that on December 17, 1943, the International Union, United Mine Workers of America entered into a contract with the operators producing approximately seventy percent of the coal tonnage of America, in which it was recognized that the miners were entitled to pay from portal to portal.

QUESTIONS PRESENTED.

1. Did the District Court err in its conclusion that the Fair Labor Standards Act did not require that there be included within the work week of underground workmen in plaintiff's mines, either time spent by such employees outside the portals of the mine before entering therein, or time spent in traveling from the portals to their usual places of work and return?

2. Did the District Court err in its conclusion that plaintiff, in computing the work week of its underground employees on the basis of hours of work in the mines at their usual working places, exclusive of the lunch period, and the time spent outside the portals, and traveling time from the portals to their usual working places and return, as provided in the effective wage agreement and continuations thereof, and in paying its underground workers for their services on that basis, has complied with and discharged all its obligations imposed upon it by the Fair Labor Standards Act of 1938?

3. Did the District Court err in dismissing the counterclaim of the defendants at the costs of the defendants?

REASONS FOR GRANTING THE WRIT.

Petitioners respectfully submit that special and important reasons exist for the granting of the Writ of Certiorari herein prayed for because:

1. The public interest will be promoted by prompt settlement in this Court of the questions involved.

The mining of coal is perhaps the most essential of all industries. The entire war effort depends upon an adequate supply of coal. Approximately 500,000 men are engaged in mining coal. They have tried to make contracts with the coal operators. No general contract between the miners and coal operators, applicable to the whole industry, has been approved by the War Labor Board. Some men, but not the counsel for petitioners, refuse to admit that the decision in the Tennessee Coal, Iron and Railroad Company Case is an adequate guide to the solution of the coal problem. During the continuation of the dispute between the operators and the

miners as to whether the Fair Labor Standards Act requires portal to portal pay and the failure to obtain the execution and approval of a contract between the operators and the United Mine Workers of America, the Government has found it necessary to seize and operate the coal mines. Continued Government operation will increase the opportunities for huge claims against the Government. From the standpoint of production, of the morale of workers, of domestic tranquillity, and of the general welfare, it is highly important that this Court declare and apply to coal mines the basic principles applicable to travel from the portal to the working place and return.

2. The decision of the District Court is an unwarranted and untenable construction of an important Federal statute, in that in effect it adds as a proviso to Section 7 of the Fair Labor Standards Act the words, "unless there is a custom or contract not to pay for such overtime."

3. The District Court has restricted the scope of the Fair Labor Standards Act by determining that some of the actual hours at which an underground worker is employed and at work may be disregarded in determining the work week if there is either a custom or a contract not to pay the employee as required by the Act.

4. The District Court has made a finding of facts which show beyond all question that the underground workmen were employed or at work from portal to portal and has reached and adopted conclusions of law directly contrary to the facts so found.

5. The District Court has refused to follow an applicable decision of the United States Circuit Court of Appeals for the Fifth Circuit.

6. The District Court has attempted to draw a distinction between underground travel in ore mines and underground travel in coal mines, when the essential nature of such travel is one and the same.

CONCLUSION.

Petitioners respectfully submit that the District Court was in error in each and every particular in the judgment rendered on January 25, 1944.

For the reasons stated herein, we believe the petition for a Writ of Certiorari should be granted.

CRAMPTON HARRIS,
Birmingham, Alabama.

WELLY K. HOPKINS,
Washington, D. C.

Attorneys for Petitioners.

FRANK W. ROGERS
and
LEONARD G. MUSE
Roanoke, Va.
Of Counsel

STATE OF VIRGINIA }
CITY OF ROANOKE, } To-wit:

Crampton Harris, being first duly sworn, deposes and says that he is the attorney for the Petitioners above-named; that he helped prepare the foregoing Petition, and that the allegations thereof are true as he verily believes.

Crampton Harris
CRAMPTON HARRIS

Subscribed and sworn to before me this 5th day of May ~~April~~, 1944.

Edith Powell-Yates
Notary Public.

STATE OF VIRGINIA }
CITY OF ROANOKE } ss.

I, Crampton Harris, Attorney at Law, admitted to practice in the Supreme Court of the United States, hereby certify that I have examined the foregoing Petition for Writ of Certiorari; that the same is not made for purposes of delay, and that in my opinion said Petition is meritorious and well founded in law and ought to be granted, and the Writ issued.

I further certify that I have personally given notice of the filing of the Petition, together with a copy of the Petition, supporting brief, and record, by serving copies thereof on George Richardson, Jr., Bluefield, West Virginia, and Wm. A. Stuart, Abingdon, Virginia, Counsel for Respondent.

CRAMPTON HARRIS

IN THE

Supreme Court of the United States

October Term, 1943

Number.....

LOCAL No. 6167
UNITED MINE WORKERS OF AMERICA,
AN UNINCORPORATED ASSOCIATION
AFFILIATED WITH THE INTERNATIONAL
UNION, UNITED MINE WORKERS
OF AMERICA, ET ALS.,
Petitioners.

versus

JEWELL RIDGE COAL CORPORATION,
A CORPORATION,
Respondent.

BRIEF OF PETITIONERS

We feel that the law has been clearly stated in the recent decision of this Court in the case of Tennessee Coal, Iron and Railroad Company vs. Muscoda Local No. 123 etc. No. 409, March 27, 1944. The applicable decisions are therein considered. We could add nothing to the legal presentation contained in that opinion.

The facts in the case are not in dispute. There were no contradictions between witnesses by which to call into

exercise the function of the Trial Judge in weighing the credibility of witnesses. The facts found by him conclusively establish the existence of work weeks in excess of 40 hours if the portal to portal rule governs. In truth, the parties expressly stipulated this at Page 407 of the Record.

The Record is merely a word picture of two coal operations. That picture is just as visible to this Court as it was to the Trial Judge. He saw perhaps a different play of lights and shadows from that appearing to us in the picture. But he described enough of the material and essential objects that make up the mining operations to compel the conclusion that the men appearing in the picture were employed or at work within the meaning of the Fair Labor Standards Act.

The legal conclusions in the judgment of the District Judge do not square with the facts nor with the views of this Court. It is in the public interest that the error be corrected speedily.

Respectfully submitted,

CRAMPTON HARRIS,
Birmingham, Alabama.

WELLY K. HOPKINS,
Washington, D. C.

Attorneys for Petitioners.

FRANK W. ROGERS
and
LEONARD G. MUSE
Roanoke, Va.
Of Counsel

APPENDIX 1

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act (Act of June 25, 1938, c. 676, 52 Stat. 1060 (29 U. S. C., sec 201)) are as follows:

Sec. 3 (g) "Employ" includes to suffer or permit to work.

Sec. 3 (j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

Sec. 7 (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

APPENDIX 2

AT A REGULAR TERM OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, CONTINUED AND HELD AT ABINGDON ON THE 25TH DAY OF JANUARY, 1944

Civil Action No. 73

JEWELL RIDGE COAL CORPORATION, A CORPORATION, *Plaintiff*

v.

LOCAL No. 6167, UNITED MINE WORKERS OF AMERICA, an unincorporated association, affiliated with the International Union, United Mine Workers of America; HARLAND HAMPTON, President, JOHN A. WHITE, Vice President, OMER KETRON, Recording Secretary, JAMES W. BELCHER, Financial Secretary, C. M. MATHENA, Treasurer, TONY FARNESE, Door Keeper, Individually and as Officers of said Local No. 6167;

CARL ALTIZER, OMER KETRON and T. V. WHITE, Individually and as Members of the Mine Committee of said Local No. 6167; H. D. HAMPTON, TONY FARNESE, and JAMES AL SMITH, Individually and as Members of the Safety Committee of said Local No. 6167;

} ORDER

LOCAL No. 7327, UNITED MINE WORKERS OF AMERICA, and unincorporated association, affiliated with the International Union, United Mine Workers of America; J. H. SHEPPARD, President, J. E. COLLINS, Vice President, FORREST RITCHIE, Recording Secretary, JOSH KEEN, Financial Secretary, C. F. CLARK, Treasurer, LYSS PATRICK, Door Keeper, Individually and as Officers of said Local No. 7327;

JOSH KEEN, J. A. WHITE and PAUL SYKES, Individually and as Members of the Mine Committee of said Local No. 7327: WALTER JACKSON, J. S. WALKER and GLENN CROUSE, Individually and as Members of the Safety Committee of said Local No. 7327;

DISTRICT No. 28, UNITED MINE WORKERS OF AMERICA, an unincorporated association, affiliated with the International Union, United Mine Workers of America; JOHN SAXTON, President, and W. F. MINTON, Secretary - Treasurer, Individually and as Officers of said District No. 28; and

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, an unincorporated association, and JOHN L. LEWIS, individually and as President of said International Union,

Defendants.

} ORDER

Not being at that time fully advised of its judgment, the Court, on November 24, 1943, having taken time to consider thereof, as appears by the order entered herein on that date, and thereafter briefs having been duly filed for both plaintiff and defendants and for Southern Coal Producers Association, *amicus curiae;* and the Court, after full consideration of the evidence, oral argument and briefs of counsel, being now fully advised of its judgment, it is therefore

O R D E R E D

that all objections to evidence, and all motions to strike out evidence, made by counsel during the course of trial and taken under advisement by the Court, be, and the same are, hereby overruled and denied, to which action of the Court in overruling their objections and denying their motions, the parties against whom this ruling is made, by counsel, duly objected and excepted upon grounds heretofore fully stated to the Court;

And the Court being of opinion, for reasons set out in its Findings of Fact and Conclusions of Law this day filed as a part of the record herein, that the law and the evidence sustain the contentions of the plaintiff upon the issues submitted to the Court, doth so adjudge: It is accordingly

ADJUDGED, ORDERED and DECLARED:

(1) That the Fair Labor Standards Act of 1938 does not require that there be included within the work week of underground workers in plaintiff's mines, either time spent by such employees outside the portal of the mines before entering therein, or time spent in traveling from the portals to their usual places of work and return; and

(2) That plaintiff, in computing the work week of its underground employees on the basis of hours of work in the mines at their usual working places, exclusive of the lunch period, and the time spent outside the portals, and travel time from the portals to their usual working places and return, as provided in the effective wage agreements and continuations thereof, and in paying its underground workers for their services on that basis, has complied with and discharged all its obligations imposed upon it by the Fair Labor Standards Act of 1938.

And all the objects of this action having been accomplished, defendants being entitled to recover nothing on their counter-claim, it is

O R D E R E D

that the same be, and it hereby is, dismissed at the costs of the defendants; to all of which action of the Court in declaring the rights of the parties contrary to their contentions, and in dismissing this action at their costs, the defendants, by counsel, duly objected and excepted upon reasons fully stated to the Court.

And it is further

O R D E R E D

that the Clerk of this Court certify and mail copies hereof, together with uncertified copies of the Court's Findings of Fact and Conclusions of Law this day filed, to George Richardson, Jr., Esq., 506 Commercial Bank Building, Bluefield, West Virginia, and William A. Stuart, Esq., Abingdon, Virginia, attorneys for the plaintiff, to Crampton Harris, Esq., 1618-20 First Na-

tional Bank Building, Birmingham, Alabama, Frank W. Rogers, Esq., 306-317 Boxley Building, Roanoke, Virginia, Leonard G. Muse, Esq., 306-317 Boxley Building, Roanoke, Virginia, and Welly K. Hopkins, Esq., United Mine Workers Building, 900 15th Street, N. W., Washington, D. C., attorneys for the defendants; and to Edward R. Burke, Esq., 515 Southern Building, Washington, D. C., and John C. Gall, Esq., 701 Southern Building, Washington, D. C., attorneys for Southern Coal Producers Association, *amicus curiae*.

Enter:

A. W. BARKSDALE,
United States District Judge.

A copy,
Teste:

LOUIS H. PRICE
Deputy Clerk.

IN THE

United States District Court

FOR THE
WESTERN DISTRICT OF VIRGINIA
AT ABINGDON,
ON THE 25TH DAY OF JANUARY, 1944

Civil Action No. 73

JEWELL RIDGE COAL CORPORATION,
Plaintiff,
v.
LOCAL No. 6167, UNITED MINE WORKERS OF AMERICA, ET AL.,
Defendants

Findings of Fact and Conclusions of Law.

STATEMENT OF THE CASE

This is a declaratory judgment action instituted by Jewell Ridge Coal Corporation, the owner and operator of two bituminous coal mines in this District, against two locals of the United Mine Workers of America and certain officials and committee members thereof, District No. 28, United Mine Workers of America, and its officers, and International Union, United Mine Workers of America and its president. The two defendant locals of the Union comprise all of the underground mine workers employed by plaintiff, said two locals being within the jurisdiction of said District 28, said District 28 in turn being a component of the International Union,

United Mine Workers of America. The complaint alleges, the joint answer of all defendants admits, and the evidence proves, the existence of an actual justiciable controversy between plaintiff and defendants as to the construction of Section 7 of the Fair Labor Standards Act. By pretrial order, it was stipulated that the issues to be now tried in this action are as follows:

> "a. What constitutes the working time which makes up the work week of plaintiff's underground employees within the meaning of Section 7 of the Fair Labor Standards Act of 1938, and what amounts, if any, are due and unpaid to such employees under said Section, the determination of such amounts, if any, to be later referred to a special master:
>
> > "(1) In reference to 'a' above, the plaintiff contends that such work week does not include that portion of the time spent by its underground employee in being transported or walking to and from their usual working places.
> >
> > "(2) In reference to 'a' above, the defendants contend that such work week includes all the time from the time such employees are required to report and do report for work at the portal of the mine until they return to the portal at the end of the shift, less the regular lunch period when they are relieved of all duties."

Neither side having demanded a jury, evidence adduced by both sides has been fully heard in open court by the court without a jury, oral argument has been heard, and briefs have been filed on behalf of both sides,

and a brief has also been filed by Southern Coal Producers Association (of which plaintiff is a member), whose petition for intervention was denied, but which was permitted to participate as an *amicus curiae.*

This action having been tried upon the facts by the court without a jury, the court doth hereby find the facts specially and state separately its conclusions of law thereon, and directs the entry of the appropriate judgment, as follows, in conformity with Rule 52(a) of the Federal Rules of Civil Procedure:

FINDINGS OF FACT

Plaintiff, Jewell Ridge Coal Corporation, owns and operates two coal mines within this District, the older one being known as the "Jewell Ridge Mine" and the other being known as the "Jewell Valley Mine". The Jewell Ridge Mine was opened in 1910, and the Jewell Valley Mine in 1936. Both mines having been in operation for a number of years, the coal now being mined is at a considerable distance from the driftmouth or portal of the mines. Jewell Ridge being the older mine, the distances there are naturally greater, and vary from approximately 4,250 feet to 25,460 feet: at Jewell Valley, the distances vary from approximately 4,600 feet to 14,450 feet. Approximately 500 men are employed at each mine. Although there are slight differences, the methods of operating the two mines are substantially the same.

The coal which is mined at these two mines exists in seams, the thickness of which varies in the two mines from 32 to 54 inches. The main tunnels into the mines, from which coal has been extracted, are known as "haulage ways". From these haulage ways, laterals have been driven which are called "cross entries". These

cross entries give access to, and form the boundaries of, "rooms", from which all the coal is taken except the pillars that are left to support the roof. Electric railways are operated for the removal of the coal when mined, and the men are also transported to and from their places of work on these railways. The company has numerous employees for the operation and maintenance of these railways and the electric power systems and the maintenance of safety within the mines, such as motormen and brakemen, trackmen, bratticemen, wiremen, and a bondman. These employees are all called "company men" and are paid at hourly rates. The employees who actually extract the coal from the seams, are known as "machinemen" and "coal loaders". The method is about as follows: Between shifts, the machinemen place their cutting machines at the faces of the seams. Each machineman then makes a cut or kerf, approximately six inches in height, at the bottom of the seam of coal and parallel to the floor, which cut extends across the width of the room or working place and back into the seam to the depth of six or eight feet. The fragments from this cutting, called "bug dust", are first removed by the "coal loader" when he begins his work, by means of a long-handled shovel. The loader then bores holes at the top of the seam of coal to the same depth as the undercut. He then places explosives in these holes and fires them. These explosions dislodge the entire section of the coal which has been undercut, pushing it down and outward. The loader, with his pick and shovel, then proceeds to load the coal thus shot down, into empty coal cars placed adjacent to his work place by operators of gathering motors. The coal is then hauled out to the tipple, processed, graded, and ultimately loaded into railway cars for shipment. All coal loaders, and ordinarily, the machinemen, are paid upon a piece-work basis, that is, at an agreed rate for each ton of coal. The

hours of labor of these piece-work employees are, however, important, because they are paid a time-and-a-half rate, or more accurately, a rate-and-a-half rate, for coal extracted by them after the expiration of seven hours of labor.

All plaintiff's employees are required to be at their places of work, for the morning shift, at 8 o'clock, A. M. The men come from their homes to the mines in various ways. Some walk, some come in their own cars at their own expense. More than 400 come in trucks and buses operated for that purpose by the plaintiff company and certain individuals, the expense of such transportation being borne by the company. The employees arrive at the mines at various times, but each in time to board the "man-trip" which is to take him to, or near, his respective place of work. "Man-trips" are trips made by trains of mine cars drawn by electric locomotives for the purpose of transporting the underground workers to or near their respective places of work. Employees leave the trains at the "man-trip stations" which are nearest to their respective places of work, and walk the rest of the way.

Upon arrival at the mines, each underground worker first obtains his lamp from the company's lamp house near the portal, which is an electric light that has been charged while the employee is off duty. Each underground worker carries with him such drinking water as he needs for the day, as well as his lunch.

After securing their lamps, various men do various things before taking the man-trip. Coal loaders, the most numerous class, do nothing, unless they have brought tools out for repair. Some four or five times a month, they bring tools out for repair, and on such occasions they go by the blacksmith shop and obtain

their repaired tools. The bondman, wiremen, brattice-men, trackmen, and such machinemen as ride man-trips, get such tools as they may have brought out of the mine from the tool house, and such supplies as they may need for the day, from the supply house, and load them into the tool cars of their man-trips. However, if these men so desire, they have the option to give their orders for supplies to the section foreman, and such supplies will be delivered on their section overnight by the supply crew. Some machinemen use motors, and those who do, get two gallons of oil from the oil house, approximately 50 pounds of machine bits from the blacksmith shop and such other equipment as may be necessary, and load such supplies and equipment onto their motors. They get their motors out of the yard, switch them to the sand house, where they fill their four sand boxes and oil the motor. They then run their motors to their assigned places of operation in the mine. Motormen and brake-men go through substantially the same process of getting out their motors and oiling and sanding them, as the machinemen do, before proceeding in the motors to their places of work. These preliminary activities require variously from three to ten minutes.

As previously stated, "man-trips" are for the trans-portation of underground workers to or near their places of work. They are operated by, and at the expense of, the company. At the Jewell Valley Mine, all under-ground workers use the man-trips to travel from the main portal to their places of work: at Jewell Ridge, approximately 72 men enter the mine at places other than the main portal and catch the man-trips at some man-trip station inside the mine, or walk all the way to their places of work. Their lamps are brought to them by their section foremen. Transportation for employees by man-trips is necessary for the successful operation

of the mines. They constitute a benefit to both employer and employees. They benefit the company in promoting safety, orderliness and increased productiveness: they benefit the employees by saving their time and energy, and thus increase their productiveness.

Each man-trip is composed of a train of empty mine cars such as are used to haul coal, drawn by an electric motor or locomotive. The first car after the locomotive, is the tool car, in which is hauled all mining tools and supplies of the men who ride that man-trip. No one is permitted to ride in the tool car. Ordinarily, seven men ride in each of the other cars of the train, never more than eight. Each car is about 12 feet long and seven feet wide inside. The bottom, or lowest part of the car, is 2 feet, 6 inches, wide. Alongside of that area, and rising above it, is a sort of bench approximately 2 feet, 3¾ths inches, wide, and above that, rise the outside walls of the car to the height of 11 inches. Men riding in these cars ordinarily sit on the bench, or, where the top is low, in the bottom of the car. The man-trips are scheduled, those going the greatest distances leaving first, and an interval between trains of at least 500 feet is maintained. The movement of the trains is governed by dispatchers, and the speed of the trains is kept within a maximum of six miles per hour as nearly as practicable. Each man-trip is under the supervision of a foreman, who sees to it that safety rules and regulations are complied with. During the course of the man-trips, foremen occasionally give instructions to employees as to the work they are to perform at their working stations. Such instances are rare, as instructions are ordinarily and customarily given at the working place. No work or labor is required of employees while riding on man-trips, and supervision is limited to the enforcement of safety rules and regulations. Those riding on man-trips sit upright where the

roof is high enough, but find it necessary to bend over where the roof is low. Riding on man-trips, while definitely not luxurious, is neither painful nor unduly uncomfortable, and is less hazardous than other phases of mining operations. All coal mining operations are relatively hazardous. During 1941, the last year for which statistics are available, there were reported to the United States Bureau of Mines, 47,742 accidents, of which, 1,075 were fatalities. Assuming that 450,000 men were then engaged in coal mining, the reported accidents represent an accident of some character to more than one out of every ten coal miners during that year. In view of these statistics, and the number of men traveling daily on man-trips in plaintiff's mines, the injuries shown by the evidence to have been received by employees in plaintiff's mines on man-trips are surprisingly few in number and extent.

If Section 7(a) of the Fair Labor Standards Act requires inclusion of travel time as work time, many, if not all, of plaintiff's underground employees have not received all the compensation required by the Act.

Both plaintiff's mines, from the very beginning, have always been operated on the "face to face" basis. The "face to face" basis means that hours of labor are computed on the basis of work at the usual working places, and therefore excludes any consideration of travel time spent in reaching the usual working places and returning therefrom. The "face to face" basis is traditional in the bituminous coal mining industry in this country, and has universally been the basis for the determination of hours of labor therein for approximately the past fifty years. In England and Continental Europe, the basis has been "bank to bank", or portal to portal, or some modification thereof.

Plaintiff's employees were first organized and became members of the United Mine Workers of America in 1933 following promulgation of the NIRA Code of Fair Competition for the Bituminous Coal Mining Industry. This NIRA Code of Fair Competition was drawn up for the industry by representatives of the Union and the Operators, and was approved by the President of the United States. It provided for the "face to face" wage basis by the use of the following language:

> " . . . and this means seven hours work at the usual working places for all classes of labor exclusive of the lunch period . . . "

Basic wage agreements were entered into by the Union and the Operators, as of April 1, 1934 (continued in effect by successive extension agreements from March 31, 1935, until October 1935), as of October 1, 1935, as of April 2, 1937, and as of May 12, 1939. All these agreements were the result of collective bargaining. The last mentioned agreement, as of May 12, 1939, to extend for a period of two years, was made when the Fair Labor Standards Act was nearly a year old and had been in effect for more than six months. Nevertheless, it, as well as the previous wage agreements, provided for the "face to face" wage basis, necessarily excluding all travel time from the work week. Also the last basic wage agreement reached by collective bargaining, dated April 1, 1941, to extend for a period of two years, provided for the "face to face" basis, in the familiar language of the preceding agreements.

Early in 1940 an investigation by the Office of Wage and Hour Administration of the operation of the Monroe Coal Mining Company in Pennsylvania was begun, to determine whether or not that company's operating practices complied with the Fair Labor Standards Act.

In the course of that investigation, the investigator raised the question of whether or not underground travel time of employees must be included in the work week under the terms of the Act. After an extended investigation, the investigator made an exhaustive report in which he discussed at length the matter of travel time and stated as his opinion that the "face to face" basis, exluding travel time, was the proper one to be applied in the coal mining industry, but he indicated that if the rule as applied in the *Cornucopia Gold Mining Company* case were applied, the Monroe Company would owe its underground workers approximately $70,000.00.

This situation was brought to the attention of Mr. Charles O'Neill, President of the Central Pennsylvania Coal Producers Association and a Director of the Monroe Company. He in turn brought it to the attention of other coal operators and of Mr. John L. Lewis, President of the International Union, United Mine Workers of America. Thereafter, representatives of the coal operators and the United Mine Workers conferred from time to time with representatives of the Office of Wage and Hour Administration. Both the Operators and the Union officials were definitely opposed to any construction of the Fair Labor Standards Act which would require payment for travel time. On July 9, 1940, the members of the Appalachian Joint Conference Negotiating Committee, for the Operators, and Mr. Earl E. Houck, Director of the Legal Department for the United Mine Workers of America, jointly composed and sent a letter to Col. Philip B. Fleming, Administrator of the Wage and Hour Division, fully setting out their views on the subject. Amongst other things in their letter, they said:

> "This method of measuring the working time at the place of work has been the standard provision

in the basic wage agreements for almost fifty years, and is the result of collective bargaining in its complete sense . . . .

"The uniform high rates of pay that have always been included in the wage agreement of the mining industry contemplate the employee's working day beginning when he arrives at his usual working place. Hence, travel time was never considered as a part of the agreement or obligation of the employer to pay for in this industry, nor as hours worked by the employees, and this has been the case since the eight-hour day was established in the industry — April 1, 1898.

"It is urged that any ruling requiring such a change in the custom, tradition and contract provision so as to change the work day from 'seven hours' work in the mines at the usual working places' to any new standard for the measurement of time worked, and to the adjustment of wage rates made necessary thereby, would create so much confusion in the bituminous industry as to result in complete chaos, and would probably result in a complete stoppage of work at practically all of the coal mines in the United States. Such a ruling, moreover, would establish such diversity of time actually spent at productive work as between different bituminous coal mines and within each mine that there would be no basis on which any general wage scales could be predicated, collective bargaining would therefore be rendered impossible throughout this industry, and the very purpose of the Fair Labor Standards Act would be defeated. In such an event, it would make necessary the reassembling of the Appalachian Joint

Wage Conference and it would be faced with an issue that would be almost impossible of solution by agreement, resulting in an industrial conflict that could paralyze the nation. This would be a most unhappy result to flow from an act that was passed by the Congress to aid workers in industries that had unreasonably long hours and unreasonably low rates of pay, as contrasted with the short hours and the high rates of pay in the bituminous coal mines. The great amount of money involved in the case of extra payment by the operators or the great changes that would be required in the rates of pay to the miners, should any change in the present contract be necessary by reason of a new standard for the measurement of time worked, is so serious that a negotiated adjustment would seem to be impossible.

"For the foregoing reasons, we believe that your Division should accept the standards of wages and hours of work, and the definition of working time, as set forth in the Appalachian Agreement (which embodies the custom and traditions of the bituminous mining industry), as complying both with the provisions of the Fair Labor Standards Act and of the Interpretive Bulletin No. 13, to the effect that 'reasonable standards agreed upon between the employer and the employee will be accepted for the purposes of the Act.'

"We therefore respectfully request that your Division issue a supplement to Interpretive Bulletin No. 13, stating that the standard of wages and hours of work and definition of working time, set forth in the Appalachian Agreement, entered into on May 12, 1940, between twenty-three district

associations of bituminous coal operators comprising the Appalachian coal producing area and the International Union, United Mine Workers of America, and the several district agreements based thereon, conform to and satisfy the requirements of the Wage & Hour Act."

By letter of July 18, 1940, from Col. Fleming, Administrator, to Mr. Houck, Director of the Legal Department of the United Mine Workers of America, Col. Fleming referring to Mr. Houck's letter of July 9, 1940, just referred to, said in part:

"In view of the circumstances which you describe in your letter, and in view of the special facts which were developed at conferences with representatives of the industry, it is our opinion that the practice of computing working time on a 'face to face' basis in the bituminous coal industry would not be unreasonable."

Promptly thereafter, Col. Fleming issued a public statement on July 27, 1940, in which he said in part:

"In view of the circumstances described by the industry in submitting its inquiry, Colonel Fleming announced that the practice of computing working time on a 'face to face' basis in the bituminous coal mining industry would not be unreasonable. Colonel Fleming explained the term 'face to face' to mean the productive work performed after the miner arrives at his usual working place, excluding the time spent in traveling from the portal or entrance of the mine to the place of work and the time spent in returning from the working place to the portal in the evening."

The Monroe Coal Mining Company case was then closed, and it was thus administratively determined that the provisions of the Fair Labor Standards Act did not require the inclusion of travel time in the work week of the underground employees in the bituminous coal mining industry.

The United Mine Workers Union has never in any way contended that travel time was work time under the Fair Labor Standards Act until the Wage Conference of March, 1943, and only contended for it then as an additional basis for its demand for a general wage increase to all mine workers, both inside and outside the mines. The 1943 demand of the Union, under the heading "Hours of Labor", for travel time, is as follows:

> "To conform with the basic and legal requirement for the industry, the maximum hours and working time provisions be amended to establish portal to portal for starting and quitting time for all underground workers."

The succeeding demand, under the heading "Wage Rate Increases", calls for a two dollar a day flat wage increase "for all classifications of inside and outside day men", and equivalent increases for piece workers, and provides:

> "The increased rates include compensation to meet the portal to portal starting and quitting time."

Thus, the 1943 demand of the Union is actually a demand for a flat wage increase to all mine workers, whether or not they spend any time traveling underground to their usual places of work, and not truly a contention that the Fair Labor Standards Act requires

inclusion of the actual travel time as work time for those who have actual travel time underground.

CONCLUSIONS OF LAW

The crucial question which I now have for determination, as set out in the pretrial order, briefly stated, is whether or not the time spent by plaintiff's underground employees in being transported or walking from the portals of the mines to and from their usual working places, constitutes working time which must be included in the work week of plaintiff's underground employees by reason of the Fair Labor Standards Act of 1938.

The pertinent portions of the Act are as follows:

"Section 7:

> "(a) No employer shall . . . employ any of his employees who is engaged in commerce or in the production of goods for commerce — . . .
>
> > "(3) for a work week longer than forty hours . . . ,unless such employee receives compensation for his employment in excess of the hours above specified, at a rate not less than one and one-half times the regular rate at which he is employed."

"Section 3:

> "(g) 'Employ' includes to suffer or permit to work."

It will be readily conceded by all, that travel by employees from the portal to their places of work, and return, is not for the pleasure, relaxation or amusement of the employees, but it is to be carefully noted that the

question is not whether it would be fair for the employer to pay employees for this travel time, or whether I think the employees should be paid for travel time; the real question is whether the language of the Act *requires* such payment. The language of the Act certainly does not in definite terms cover the question here presented. So it would seem advisable to look into the legislative history of the Act.

LEGISLATIVE HISTORY OF THE ACT

I can neither find, nor has anything been pointed out to me, in the legislative history of the Fair Labor Standards Act of 1938, which indicates that it was the intent of Congress to make so radical a change in the wage structure in the bituminous coal industry as to require payment for underground travel time. It is idle to say that, because employees in other industries are compensated under the Act for travel time under various and diverse conditions and circumstances, underground employees in the bituminous coal industry under and by virtue of the Act, must be paid for travel time. Circumstances alter cases. Under some circumstances, travel time is work time: under other circumstances it is not. The bituminous coal industry is *sui generis*. Its problems have been before Congress for many years. It is one of the few industries, for the regulation of which special Acts of Congress have been passed such as the two Guffey Acts. It is a highly competitive industry. Not only is there competition between the individual coal operators: there is competition between the northern operators and the southern operators, and always there is the sharpest kind of competition between the producers of bituminous coal and the producers of other fuels such as oil and gas. These conditions and many others are important factors which must be regarded in

making up a wage structure for the bituminous coal industry. And in this industry, the wage structure is of peculiar importance because the cost of labor makes up approximately two-thirds of the cost of the production of coal. Of course, the Fair Labor Standards Act applies to the bituminous coal industry, as it applies to all interstate industry, but in situations not precisely covered by the language of the Act, its legislative history, as well as all the facts and circumstances, should be examined.

The first general regulation of wage and hour standards for private employment was embodied in the National Industrial Recovery Act. In the Bituminous Coal Code, adopted under the NIRA in 1933, travel time was definitely excluded, and the "face to face" basis was adopted by the following language:

> "No employee shall be required or permitted to work more than eight hours in any one day *at the usual working places* . . . " (Italics mine).

Similarly, in the 1934 amendment, it was provided that:

> "Seven hours of labor shall constitute a day's work, and this means seven hours' work *at the usual working places for all classes of labor*, exclusive of the lunch period, whether they be paid on the day or the tonnage or other piece-work basis; . . . " (Italics mine).

This Code remained in effect until 1935, when the National Industrial Recovery Act was held unconstitutional.

In 1937, fair labor standards bills were introduced in both Houses of Congress, and extensive committee

hearings were held on these bills. Mr. John L. Lewis, President of the United Mine Workers of America, testified at length, and at no time indicated that travel time should be included as work time. On the contrary, he indicated that he did not expect the bill to affect the coal industry. The following excerpts are from his testimony:

"Senator LaFollette. . . . As I understand it, the objective of this bill as outlined in Section 23, one of them is to prevent the board from going in and upsetting collective bargaining agreements or entering the field where collective bargaining is actually functioning in a bona-fide manner, and thereby producing the result of the action of the employer and employee represented by genuine and effective labor organization." (Page 280).

"Mr. Lewis. . . . For instance, frankly I would not want this bill to convey power to a board to order an investigation into all of the wage agreements in the mining industry right now, or to give the board power to decide that the collective-bargaining agreements in the mining industry were not sound, not proper, were confiscatory, or not in harmony with the facts of the industry and order a modification thereof. I think the power of the board should be limited to cases which run below the level of the standards fixed by Congress. I see endless confusion in the adoption of section 5 now. I see a drift toward the complete fixation of wages in all industry by governmental action." (Page 281).

"Senator Holt. Would you favor allowing the board to investigate collective bargaining

agreements where the collective bargaining agreement was beyond the wage level?

"Mr. Lewis. No; I see no point in it.

"Senator Holt. If they have a right to investigate collective bargaining agreements below the wage level why should not they have the right to investigate collective bargaining agreements above the wage level?

"Mr. Lewis. Merely because their right of investigation of agreements that were substandard would be for the purpose of ascertaining whether that was so and of modifying them to meet the congressional standards". (Page 297).

Excerpts from "Joint Hearings Before the Committee on Education and Labor, United States Senate, and the Committee on Labor, House of Representatives, June 2-22, 1937."

In its report on an amended bill in the nature of a substitute, the Senate Committee on July 6, 1937, said:

"The right of individual or collective employees to bargain with their employers concerning wages and hours is recognized and encouraged by this bill. It is not intended that this law shall invade the right of employer and employee to fix their own contracts of employment, wherever there can be any real, genuine bargaining between them. It is only those low-wage and long-work hour industrial workers who are the helpless victims of their own bargaining weakness that this bill seeks to assist to obtain a minimum wage."

(Senate Report No. 884, 75th Cong.).

During the debates on the bill, numerous statements were made indicating that it was not the intent of Congress to interfere with the process of collective bargaining. The following are of interest:

"Mr. Walsh. Next, does the bill affect collective bargaining agreements already made or hereafter to be made between employer and employee?

"Mr. Black. It does not". (Senate, July 27, 1937. Congressional Record, Vol. 81, p. 7650.)

"Mrs. Norton. . . . It is not the intention of this amendment, or of the bill, to start fixing wages in all industries but only in those in which oppressive wages are being paid to a substantial portion of workers . . . " (House, December 13, 1937, Congressional Record, Vol. 82, p. 1391.)

"Mr. Randolph. . . . It (the bill) is not concerned with that fortunate majority of the laboring classes whose collective bargaining power is sufficiently potent to insure the preservation of their industrial rights.

"But it is concerned with those millions in industry who are unprotected and unorganized. . . . " (House, December 13, 1937, Congressional Record, Vol. 82, p. 1395. Parenthesis supplied.)

"Mr. Curley. . . . There is no conflict of jurisdiction under the provisions of this fair standards of labor bill, and the existing labor organizations of this country. The bill concerns only of relieving the paralysis which, at present, shackles

misery and poverty to millions of heads of families, who are underpaid and causing a colossal financial loss in purchasing power because of existing deplorable conditions." (House, May 23, 1938, Congressional Record, Vol. 83, p. 7283.)

"Mr. Boileau. . . . What is more, we are preserving for organized labor its right to bargain collectively and it will bargain for a higher wage than that." (House, May 23, 1938, Congressional Record, Vol. 83, p. 7290.)

"Mr. Allen. . . . This bill has a threefold purpose as I see it. First, it eliminates sweat shops — . . . The bill does not affect organized labor, but those 5,000,000 American working men and women who have not yet been benefited by organized labor." (House, May 23, 1938, Congressional Record, Vol. 83, p. 7291.)

"Mr. Fitzgerald. . . . I would have you observe that this proposed legislation will not improve the wages and hours of the majority of workers, nor does it attempt to. For I am greatly pleased to say that the majority of workers do not need this legislation because they are receiving a living wage and are not forced to work unreasonable hours." (House, May 23, 1938, Congressional Record, Vol. 83, p. 7310.)

Although the above statements were made at various times while the measure was being amended and revised, and therefore not with respect to the Bill in its final form, they show a continuing intention not to interfere with the processes of collective bargaining.

No such statute was enacted in 1937, and in regard to wage and hour legislation, in his message delivered on January 3, 1938, the President said:

> "We are seeking, of course, only legislation to end starvation wages and intolerable hours; more desirable wages are and should continue to be the product of collective bargaining." (Congressional Record, Vol. 83, p. 9.)

Shortly before the passage of the Fair Labor Standards Act of 1938, Congressman Connery, one of its patrons, said of it:

> "The thing to remember about this bill is that it is not designed to be a cure-all for industrial wages. It is merely aimed at wiping out sweatshop conditions and child labor. Those are the two salient features and should be kept in mind." (House, May 23, 1938, Congressional Record, Vol. 83, p. 7322.)

Thus, it seems to me clear that it was neither the intent of Congress nor the desire of the Union, in the enactment of the Fair Labor Standards Act of 1938, to interfere in any way with the wage structure of the bituminous coal industry. A statement made by Major Percy Tetlow, an official of the International Union, United Mine Workers of America, who testified in this case, seems to bear out this conclusion. He said:

> "No, the miners' organization has always taken the position that the question of wages, hours and conditions of employment should be governed and controlled by agreements under collective bargaining in the industry more so than by legislation. We have always taken the position that any legis-

lation which will improve standards of working men and women, —to favor it and foster it and support it. Fundamentally, we are opposed to legislation that controls the daily wage and conditions of employment. We think that is a relationship that should exist between employer and employee."

THE ADMINISTRATIVE RULING

The fact that the precise question here presented has been investigated and ruled upon by the governmental administrative agency charged with the enforcement of the Act, seems to me to be of paramount importance.

The evidence in this case shows beyond question that in July, 1940 the Administrator of the Wage and Hour Division, Department of Labor, ruled that travel time of underground workers in the bituminous coal industry was not work time within the purview of the Fair Labor Standards Act. There is no suggestion that there has been any modification of this ruling. The Administrator was invited by plaintiff to intervene in this action, of which invitation he must have been aware, as his Regional Attorney was present in court throughout the trial and also attended the pretrial conference. I must therefore assume that the Administrator did not wish to retract or modify his ruling of July, 1940.

Of course, an administrative ruling does not have the force of law. In one instance, where I was satisfied that an administrative ruling was plainly wrong, I declined to follow it. *Magann* v. *Long's Baggage Transfer Co.*, 29 F. Supp. 742. However, as to such rulings, the Supreme Court has said:

"In any case such interpretations are entitled to great weight. This is peculiarly true here

> where the interpretations involved 'contemporaneous constructions of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new' ".

United States v. *American Trucking Associations*, 310 U. S. 534, 549.

> " . . ., it has been the settled law that when uncertainty or ambiguity, such as we have here, is found in a statute, great weight will be given to the contemporaneous construction by Department officials, who were called upon to act under the law and carry its provisions into effect . . ."

National Lead Co. v. *United States*, 252 U. S. 140, 145. See also *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, *Securities Exchange Commission* v. *Associated Gas & Electric Co.*, 99 F. (2d) 795, 798; *Butte Miners Union* v. *Anaconda Copper Mining Co.*, 112 Mon. 372, 118 P. (2d) 148.

Consequently, I have generally followed such rulings. *Reliance Storage and Inspection Co., Inc.* v. *Hubbard*, 50 F. Supp. 1012, 1014.

It seems to me that this particular administrative ruling is entitled to even more than the "great weight" to which the Supreme Court said such rulings were entitled generally, by reason of the thoroughness with which the Administrator went into the question before making his ruling. It appears from the evidence that the question first came to the attention of the coal operators through what was probably a routine investigation of the operating practices of the Monroe Coal Mining Corporation in Pennsylvania, made by a representative of

the Wage and Hour Division to determine whether or not this company was complying with the Act. After a thorough investigation, this investigator reported that in his opinion, travel time in the bituminous coal industry should not be considered as work time, but that, as travel time had been counted as work time in metal mining in the consent decree entered in the *Cornucopia Gold Mining* case, possibly it would be necessary to count travel time as work time in the bituminous coal mining industry. Upon learning of this situation, high officials of the coal operators associations took the matter up with the president and high officials of the United Mine Workers of America, who all agreed, apparently without dissent, that the Act did not require the inclusion of travel time as work time, and that the Administrator should so rule. Representatives of the operators and of the Union expressed this view to various representatives of the Wage and Hour Division, and finally to the Administrator, Colonel Fleming himself. Colonel Fleming "indicated that if in this long period of collective bargaining in the mining industry that that (the face-to-face basis) was the basis upon which payment for work was agreed upon, that there wasn't any reason why he should wish to disturb it. He said that he felt that a *bona fide* arrangement of that kind of history of fifty years, certainly ought not to be disturbed, particularly after the description we had given him of the disturbance that would be occasioned in the industry by any such revolutionary change in its wage structure." However, Colonel Fleming did not then make a ruling, but referred the representatives of the operators and the Union to the Regional Director of the Office of the Wage and Hour Division in Philadelphia and his attorney. After conferring with those officials, the representatives of the coal operators and the Union wrote and delivered the letter of July 9, 1940, quoted from in my

findings of fact, and which is generally referred to as the "Houck letter". Then after receiving a report of this conference, Colonel Fleming made and announced the administrative ruling that in the bituminous coal industry, the Fair Labor Standards Act did not require the inclusion of travel time of underground workers as work time.

I do not find anything in this record which satisfies me that this ruling was plainly wrong: in fact, I find nothing which casts doubt upon its correctness. Giving to it the "great weight" to which the Supreme Court has said it is entitled, it is my conclusion to follow and sustain this ruling.

CASE OF TENNESSEE &c. v. MUSCODA &c.

Defendants principally rely upon the case of *Tennessee Coal, Iron & Railroad Co. et als* v. *Muscoda Local No. 123, et als*, (5th Circ.), District Court, 40 F. Supp. 4, Circuit Court, 135 F. (2d) 320, and on rehearing, 137 F. (2d) 176. This also was a declaratory judgment action, for the determination of what constituted the work week of underground iron ore miners under the provisions of the Fair Labor Standards Act of 1938. The District Court considered separately whether—

(1) The time spent on the surface in obtaining and returning tools and equipment,

(2) travel time from the portal to and from the usual places of work, and

(3) the lunch period,—

constituted working time within the meaning of the Act, and concluded that (1) the time spent on the surface in obtaining and returning tools and equipment, and (2)

travel time from the portal to and from the usual places of work, must, under the Act, be included in the employee's work week, and that (3), the lunch period, did not constitute working time and need not be included in the work week.

On appeal, the Circuit Court (one judge dissenting) affirmed as to (2) and (3), but reversed as to (1).

At the outset, it is interesting to note that the majority of the Circuit Court, especially in the opinion on rehearing, strictly confine their holding to the particular circumstances of that instant case, and that the majority holding was merely a refusal, "because not clearly erroneous, to set aside a finding supported by evidence as to what constituted working time of employees in the particular circumstances." (p. 183). The Court said (p. 183):

> "In a supplemental brief, one of the appellants says that the effect of our decision, the plain and definite holding of the majority, is that as a matter of law the time consumed in traveling from the portal of the mine to the face and in returning therefrom to the portal 'must be included in the working time that makes up the work-week of every ore-mining employee within the meaning of Section 7 of the Fair Labor Standards Act.' We did not so hold, and such should not be the effect of our decision.
>
> "We have written in vain if our opinion is to be interpreted as providing a rigid definition of working time, or as upholding the portal-to-portal theory as a matter of law, or as denying the principle that *in close cases it is well to afford the fullest possible scope to agreements among the individuals*

who are actually affected. The evidentiary value of such agreements in relation to working time is for the jury or other fact-finding tribunal. We have expounded no rigid definition of working time.

"The Act fails to provide one, and we should not do what was deemed unwise to do by legislation. The Congress probably failed to define working time for the same reason that it refrained from attempting to define the regular rate of pay, namely 'because the employment relationships to which the Act would apply were so various and unpredictable'.

"Appellants sought by declaratory judgment to obtain a rigid definition of working time favorable to them. They now chide us for laying down such a definition against them. We do not do either; *we merely refused, because not clearly erroneous, to set aside a finding supported by evidence as to what constituted working time of employees in the particular circumstances.* The Act of Congress in this respect differs from the legislation of those mining states that limit worktime in underground mines to eight hours per day, and that include in this reckoning all time spent underground."

(Italics mine).

Defendants do not here contend that lunch time is working time. They do contend that working time for the underground employees begins as soon as they are required to and do report at the portal, and continues until they return to the portal at the end of the shift, thus including all the time spent in obtaining lamps, tools or equipment, and other preparatory activities, as well as travel time.

As to the time spent in preparatory activities, estimated to consume here from three to ten minutes, I agreed with the majority holding in the *Tennessee* v. *Muscoda* case, *supra*, which is there set out as follows at page 323:

> "With respect to time spent by employees checking in and out and procuring and returning tools, lamps, and carbide, the case stands differently. It appears that the workers were obliged to furnish their own tools, lamps, and carbide, and were free to exercise their own judgment as to when, where, and how they should procure their equipment. The company merely instructed them as to the equipment needed, and did not attempt further to regulate the matter. The checking system used by appellants required the employees only to deposit a metal disc at the tally house when arriving for work, and to pick it up again at the end of the shift. In addition to the practical difficulties incident to the computation of isolated moments so elusive in character, we think these pursuits should not be computed as work-time, since they fall within the category of duties incident to qualifying the employee to perform his work rather than within the scope of his actual employment."

As to travel time, I do not agree that the majority holding in the *Tennessee* v. *Muscoda* case, *supra*, should be applied here, as contended by counsel for defendants. In the first place, the weight of the *Tennessee* v. *Muscoda* case, *supra*, is considerably lessened by strong dissent of Sibley, Senior Circuit Judge, in which, in part, he said:

> "The Act does not define 'work time' or even 'work'. It may apply to each and every industry.

What would be work in one industry may not be in another. It seems to me that a man is at work, for the purposes of the Act, when he is doing what he is hired to do. It may involve mental or physical effort, or it may consist in simple presence. It all depends on the contract of hiring. The Act did not intend to upset and nullify the wage contracts of force in the various industries. It simply fixed minimum wages for work done under them, and maximum hours. Of course, contracts yield to the Act on these points, but they still control as to the work to be done, and the way it is to be done, and as to the scale of pay if not less than the minimum fixed by the Act. These things are left to bargaining, and especially to collective bargaining under the principles of the National Labor Relations Act, 29 U. S. C. A., Sec. 151 et seq.

"No question is older in such bargaining than the question whether 'travel time' is to be included 'work time'. The worker has always thought he ought not to lose all of the time necessary to go to and from his place of work; the employer has thought he ought not to pay for time that produces no work results. The dispute has been resolved in various ways in employment contracts for pay estimated by the hour. Plumbers demand and get pay from the time they leave their places of business to go to a job until they return. Railroad trainmen get pay from the time they report for duty, no matter what delay may occur in the starting of the train. Railway trackmen also are paid from the hour of their assembly at the section point, though they may ride their motor car for miles before doing any track work. On the other hand, carpenters, masons and most artizans and

laborers are paid for work only after they take up their tools on the job. As to coal and iron ore miners, traditionally they have been paid according to production, but their modern contracts have always included an express agreement as to their work time, and that agreement has excluded from work time the travel time in reaching the coal seam or ore bed, which were agreed to be the place of work. This is true of the collective bargains made by strong unions throughout the Appalachian region, as it is true of the bargains under which the miners in this case have worked. Their work time is agreed to be that spent at the ore bed. The employers' arrangement to get them to that place reliably and safely is primarily for the benefit of the miner and is not work for the employer, according to these agreements. The discomforts and dangers of the trip, as well as the loss of time, are all considered in fixing the rate of pay for the work of extracting the ore, and the pay scales here involved are far above the minimum fixed by the Act. The miner's work is hard and dangerous, but his pay is supposed to compensate for all this. If it would be better to include travel time in work time, it ought to be done by a new bargain in which rates of pay are also reviewed. If the change is to be by a special statute (some western States have such statutes), it will operate justly in future, and not by unexpected penalty, as here.

"There is nothing in the Act to outlaw agreements that travel time in getting to or from the agreed place of work is not work time. This is true though the employer may organize a means of transportation and make rules for its use. The agreements here that work time includes only time

at the face of the ore bed are not illegal. Digging out the ore is what the miners agree to do, and for that they are paid. Getting their tools together and riding or walking to the agreed place of work is not, by force of any law, work done for the mine owner. No one, I suppose, would say that if a group of miners who had spent an hour riding to work decided of their own will not to dig any ore and spent another hour riding back, they had done any work for which they should be paid by force of the Act."

However, conceding the correctness of the decision of the majority in the *Tennessee* v. *Muscoda* case, it seems to me that this decision is clearly distinguishable from the instant case and not in point here. In deciding the issue as to travel time, the District Court in its conclusions, and the Circuit Court on appeal, relied upon certain controling considerations.

First, there it appeared that the Administrator of the Wage and Hour Division, United States Department of Labor, had recently ruled that in the metal mining industry, travel time was work time, and furthermore, the Administrator there intervened and made substantially the same contentions as did the several defendants. Here, the situation is precisely the converse. In July, 1940, the Administrator announced his ruling that in the bituminous coal industry, travel time was not necessarily work time under the Act, and there has been no subsequent modification of this ruling. And as has been heretofore mentioned, although plaintiff in its complaint asserted that the Administrator was interested in the construction and application of the Act and invited his timely intervention in this action, the Administrator has neither sought to intervene nor appear as an *amicus*

curiae, although his Regional Attorney was in attendance throughout.

Second, there it did not appear to the satisfaction of the court that by established usage throughout the industry, travel time was uniformly excluded from the work week. It does appear here, beyond any question, that travel time has never been considered as, or included in, work time by anyone in the bituminous coal industry in this country. On the contrary, for certainly the past fifty years, the "face to face" basis has been universally recognized in the bituminous coal industry as the basis for computation of work time.

Third, there, the court concluded that, although it be conceded that recent wage contracts did exclude travel time from the work week, such contracts were not free and uncoerced agreements on the part of the mine workers, but reflected the dictation of the employers and the inability of the employees and their union to obtain recognition of their right, as repeatedly asserted and contended for, to be paid for their underground travel time. Here, we have the word of both the operators and the Union that as to the "face to face" basis, "This method of measuring the working time at the place of work has been the standard provision in the basic wage agreements for almost fifty years, and is the result of collective bargaining in its complete sense." On this point, an excerpt from the brief of counsel for the iron miners in the *Tennessee* v. *Muscoda* case, on appeal, is quite interesting (p. 59):

> "We are not trying the case of coal miners. We are not experts on coal mining. We do know that there are two great differences between the coal mining situation and the mining of iron ore in

Jefferson County. *In coal mining we find a union which has been strong and powerful and which as a union has been engaged in collective bargaining with the coal operators over a long period of years. In our case we find the efforts of the men to organize their union presents a pitiable picture of helplessness against the domination of the mining companies.* In coal mining the men work seven hours per day. At no point in the voluminous record created by the appellants do we find a single ore mining company offering to pay its men on a seven hour day."

(Italics mine).

The record in this case by no means discloses "a pitiable picture of helplessness against the domination of the mining companies". On the contrary, the record here does disclose the picture of the "strong and powerful" union mentioned by counsel, which is able and willing, when it feels aggrieved, even in time of war, to paralyze the production of bituminous coal in this country by a strike or, in the euphemistic language of its members, "a work stoppage while awaiting a contract". It is hardly likely that such a union has been coerced by by coal operators into waiving any valuable monetary right to which its members were entitled by law.

Fourth, there the court found that the underground travel was under conditions peculiar to the mining of iron ore which were replete with hazards, highly uncomfortable and requiring physical exertion, due largely to overcrowding of cars, and which were unpleasant and disagreeable because of bad odors, heat and poor ventilation, and were burdensome to those encountering them. Here, although I have not found that the "man-trips" constituted pleasure excursions, I have found no such

painful and burdensome conditions as those described in the iron ore mines.

For the reasons set out above, it appears to me that the *Tennessee* v. *Muscoda* case is clearly distinguishable from the instant case, and should not govern, conceding that the *Tennessee* v. *Muscoda* case was correctly decided by the majority.

Other cases involving the question of travel time in other industries under various circumstances and in the light of various statutes have been cited and discussed by counsel for both sides. It does not seem to me that they are sufficiently pertinent to the particular situation here presented, to warrant a discussion of them herein.

CONTEMPORANEOUS CONSTRUCTION AND AGREEMENTS BY THE PARTIES.

The proposition, that contracts made in violation of the Fair Labor Standards Act, or any other valid Act of Congress, are ineffective as against the Act, is too plain to require the citation of authority. And it is equally true that custom and usage, no matter of what long standing, cannot prevail against an Act of Congress. As well stated by counsel for defendants here, acts of Congress are frequently designed to change customs and usages which are deemed unfair, harsh or oppressive. Nor can contemporaneous understandings or constructions of the act by the interested parties alter its plain terms.

However, in this case, the plain terms of the Act do not cover the precise situation here presented. The question of when travel time is work time, and when it is not, is a question which may require a diversity of answers in diverse situations, as pointed out by Judge

Sibley in the *Tennessee* v. *Muscoda* case, *supra*, at page 323 thereof. It is quite true, as urged by defendants' counsel, that that which is plain requires no interpretation and presents no occasion for the use of extrinsic aids to its construction, but I cannot agree with their contention that the plain language of the Fair Labor Standards Act requires inclusion of travel time as work time. It seems to me that the language of the Act relied upon by defendants *quoad* travel time, falls far short of sustaining their contention in plain terms. In such a situation, it seems to me some of the very cases cited and relied upon by defendants' counsel recognize the principle that extrinsic aid should be sought.

> "Long continued practice and the approval of administrative authorities may be persuasive in the interpretation of doubtful provisions of a statute, but cannot alter provisions that are clear and explicit when related to the facts disclosed."
>
> *Louisville & Nashville &c. Co.* v. *United States*, 282 U. S. 740, 759.

> "The general rule is perfectly well settled that, where a statute is of doubtful meaning and susceptible upon its face of two constructions, the court may look into prior and contemporaneous acts, the reason which induced the act in question, the mischiefs intended to be remedied, the extraneous circumstances, and the purpose intended to be accomplished by it, to determine its proper construction, but where the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it."
>
> *Hamilton* v. *Rathbone*, 175 U. S. 414, 419.

In this case, more than 400 employees travel from their homes to the mines in trucks and buses operated by the company. If they are entitled to pay for the time spent in traveling from the portal of the mine to their usual places of work, might it not also be contended that they are entitled to pay for the time spent in travel from the points where they board the trucks and buses to the mines? If "surrender of freedom of action" be any criterion, as contended by defendants' counsel, do not these employees surrender their "freedom of action" when they become passengers on plaintiff's vehicles?

It does therefore seem important to inquire into the customs and usages of this industry, the contracts and agreements made between the parties, and the contemporaneous construction placed upon the Act by the interested parties. The evidence shows beyond question that, in the bituminous coal industry in this country, for the past fifty years, travel time of underground workers has not been considered work time. By the NIRA Code for the bituminous coal industry, travel time was definitely excluded from work time. By the precise terms of all subsequent contracts between plaintiff and defendants, and between employers and employees generally in the bituminous coal industry, travel time has been excluded from work time.

But the defendants contend that the last contract expired March 31, 1943, and that thereafter, in the absence of contract, the Fair Labor Standards Act applied, and that by virtue thereof travel time became work time. Defendants, by an amended answer, have disclaimed any compensation for overtime prior to April 1, 1943. Plaintiff contends that the contract, which by its terms was to expire March 31, 1943, was continued in force by the parties pursuant to directives of govern-

mental agencies. Certainly, the parties continued to operate under the contract of April 1, 1943, to the time of the institution of this action. However, it seems to me that the question of whether or not this contract was continued in force and remained binding upon the parties during this period, is neither important nor material. If the Fair Labor Standards Act, from its effective date, required the inclusion of travel time as work time, it did so irrespective of contract, and if there was a contract to the contrary, the contract would be ineffective as against the Act.

What does seem to me important and controlling is that by the universal custom and usage of the past fifty years, and by agreement of the parties in every collective bargaining agreement which was ever made, it was universally recognized that in the bituminous coal industry, travel time was not work time. And this is the condition which prevailed when the Fair Labor Standards Act was enacted in 1938, and of which it must be presumed Congress was aware.

> "It is now a settled principle of statutory construction that Congress or a Legislature, in legislating with regard to an industry or activity, must be regarded as having had in mind the actaul conditions to which the act will apply; that is, the needs and usages of such activity."
>
> *United States* v. *Turner Terpentine Co.*,
> 111 F. (2d) 400, 404.

> "Usages long established and followed, have, to a great extent, the efficacy of law in all countries. They control the construction and qualify and limit the force of positive enactments."
>
> *Slidell* v. *Grandjean*, 111 U. S. 412, 421.

The contemporaneous construction of the Act by the interested parties in the bituminous coal industry could not possibly appear more clearly nor fully than as set out in the letter of July 9, 1940, written to the Administrator by responsible representatives of the coal operators and the United Mine Workers jointly, and usually referred to as the "Houck letter". In this letter, not only is there no suggestion that by the terms of the Fair Labor Standards Act, travel time must be included in working time; on the contrary, it is positively asserted that any change from the traditional "face to face" basis would "result in complete chaos, and would probably result in a complete stoppage of work at practically all the coal mines in the United States"; and "moreover", that "*the very purpose of the Fair Labor Standards Act would be defeated*" by such a change.

This entire letter is so illuminating that I append it *in extenso* as a foot note hereto. (*See pages 66 to 72, incl.*)

> "Presumably, Congress refrained from attempting such a definition because the employment relationships to which the acts would apply were so various and unpredictable. And that which it was unwise for Congress to do, this Court should not do. *When employer and employee have agreed upon an arrangement which has proved mutually satisfactory, we should not upset it and approve an inflexible and artificial interpretation of the Act which finds no support in its text.* . . . "
>
> *Walling* v. *Belo &c.*, 316 U. S. 624, 634.
>
> (Italics mine).

CONCLUSIONS.

For the reasons set out above, my conclusions of law are

(1) That the Fair Labor Standards Act of 1938 does not require that there be included within the work week of underground workers in plaintiff's mines, either time spent by such employees outside the portal of the mines before entering therein, or time spent in traveling from the portals to their usual places of work and return.

(2) That plaintiff, in computing the work week of its underground employees on the basis of hours of work in the mines at their usual working places, exclusive of the lunch period, and the time spent outside the portals and travel time from the portals to their usual working places and return, as provided in the effective wage agreements and continuations thereof, and in paying its underground workers for their services on that basis, has complied with and discharged all its obligations imposed upon it by the Fair Labor Standards Act of 1938.

An order will be entered declaring the rights of the parties in accordance with the above conclusions, and dismissing this action at the costs of the defendants.

A. W. BARKSDALE,
United States District Judge.

FOOT NOTE No. 1

1617 Pennsylvania Boulevard
Philadelphia, Pennsylvania
July 9, 1940.

Col. Philip B. Fleming, Administrator,
Wage and Hour Division,
Department of Labor,
Washington, D. C.

Dear Mr. Administrator:

As a result of certain investigations which have been conducted by the Wage & Hour Division at bituminous coal mines in Pennsylvania, particularly at the Revloc shaft of the Monroe Coal Mining Company, and a conference that has been held by your Supervision Inspector, Mr. Caffey, at Pittsburgh, Pa., with a committee of the Western Pennsylvania Coal Operators' Association, concerning the application of the Fair Labor Standards Act to the bituminous coal mining industry, certain questions have arisen that are disturbing to both employers and employees within the industry. These uncertainties have been continuing for some time and are causing much concern to the mine workers and the mine operators, especially with reference to "travel time."

Today, the Negotiating Committee of the Appalachian Wage Conference, namely: Messrs. J. D. A. Morrow, President of Pittsburgh Coal Company. L. T. Putnam of the Raleigh Wyoming Mining Company, Beckley, W. Va.; L. C. Gunter, of the Southern Appalachian Coal Operators' Association, Knoxville, Tenn.; Charles O'Neill, President of the United Eastern Coal Sales

Corporation, New York City; C. E. Cowan, Vice President of Monroe Coal Mining Company; Fredrick H. Knight, counsel for Monroe Coal Mining Company; W. L. Robinson, President of the Youghiogheny & Ohio Coal Company and Chairman of the Appalachian Wage Conference on the one hand, and Mr. Earl E. Houck, Director of the Legal Department of the United Mine Workers of America, met with Mr. Dorsey, Regional Director, Philadelphia, Pa., and Mr. Gallagher, Regional Counsel, Philadelphia, Pa., at which time these questions were discussed at length, particularly the application of the Act as to the question of hours of work in the bituminous coal industry.

The mine workers and the mine operators present presented their views to representatives of the Wage and Hour Division as to the provisions of the Appalachian Wage Agreement covering maximum hours and working time. We have filed with the Division copy of the Appalachian Wage Agreement, and the entire provision as to maximum hours and working time is included therein. The pertinent language, however, is "Seven hours of labor shall constitute a day's work. The seven-hour day means seven hours' work in the mines at the usual working places for all classes of labor, exclusive of the lunch period, whether they be paid by the day or be paid on the tonnage basis * * *." The Appalachian Wage Agreement is the basic agreement for the bituminous mines in the States of Pennsylvania, Ohio, West Virginia, Virginia, Eastern Kentucky, Southeastern Tennessee and Maryland. In this territory there are several thousand rail shipping mines employing from 300,000 to 325,000 men, and some twenty-three operating districts. Each of the districts work out a local wage agreement covering its own territory, subject, however, to the provision that it must include within it all of the

provisions of the Appalachian Agreement. The mines in the Appalachian region produce 70% of the total bituminous coal produced in the United States annually. Also, the Appalachian Agreement is used by the United Mine Workers of America as the basic agreement upon which the district agreements of the remaining 30% of the country is predicated.

The United Mine Workers of America and coal operators of the United States have been negotiating wage agreements for a period of fifty years. The Appalachian Agreement, covering as it does a great number of men and mines, has been worked out over that period of time and covers within its general provisions myriad wage rates, conditions of work, and hours of employment. This agreement, with its twenty-three supplemental agreements, constitutes a whole document. In those conferences, of course, hours of work has been one of the principal matters of consideration during this period of time. Hours of work with wage rates constitute the heart of any such agreement. In this basic industry we have provided for seven-hour days, five-day weeks, thirty-five hours per week, with high rates of pay. The basic inside day rate in the North is $ .857 per hour, and in the South it is $ .80 per hour. The underground workers are paid on this basis with maximum rates for mobile loading machine operators, approximately $1.09 per hour. In addition, the agreement provides, "work by mine workers paid by hour or day in excess of seven hours in one day, or thirty-five hours in any one week, shall be paid for it at the rate of time and one-half * * *." It is our opinion that these substantive provisions of the agreement are among the highest standards of labor provided in any industry in the United States, both as to hours of working time and as to wages paid. There is full and complete understanding in the industry be-

tween employer and employees as to the application of these provisions. This method of measuring the working time at the place of work has been the standard provision in the basic wage agreements for almost fifty years and is the result of collective bargaining in its complete sense.

There are many reasons why the provision as to working time has been set out as provided by this agreement. The impracticability of measuring time by any other method is inherent in the very nature of mining coal. Coal mines are sometimes very extensive. When they are first opened up, the working places are, of course, close by and near to the opening of the mine. In such cases there is no problem of either transportation of the men to the working places or time consumed in reaching them; but as mines grow older, the working places move farther and farther away from the portal or opening of the mine, and as such conditions develop, it becomes necessary for provision to be made for transportation of the men over long distances to their working places. This is usually provided by what is known in the industry as "man trips." These trips are scheduled to leave the outside or opening of the mine at a certain hour, so that all the employees will reach their working places by the hour at which work regularly begins at the working places throughout the mine, and these trips are also scheduled to leave the inside of the mine when the day's work is done, at the conclusion of the seven-hour period of work at the working places. Among other provisions of the agreement, there is provided a time for starting the day's work and a lunch period, as well as a time for expiration of the work day. There is some variation in this, depending upon local conditions as to the starting and quitting time at the various collieries. The agreement provides for a certain tolerance. In any event, the starting and quitting time are no more

than seven hours apart, exclusive of the lunch period.

In the many conferences that have been held over this period of fifty years, naturally all manner of suggestions and proposals for amplification or amendment of the agreement has been made both by the mine workers and the operators.

The uniform high rates of pay that have always been included in the wage agreement of the mining industry contemplate the employee's working day beginning when he arrives at his usual working place. Hence, travel time was never considered as a part of the agreement or obligation of the employer to pay for in this industry, nor as hours worked by the employees, and this has been the case since the eight-hour day was established in the industry—April 1, 1898.

It is urged that any ruling requiring such a change in the custom, tradition and contract provision so as to change the work day from "seven hours' work in the mines at the usual working places" to any new standard for the measurement of time worked, and to the adjustment of wage rates made necessary thereby, would create so much confusion in the bituminous industry as to result in complete chaos, and would probably result in a complete stoppage of work at practically all of the coal mines in the United States. Such a ruling, moreover, would establish such diversity of time actually spent at productive work as between different bituminous coal mines and within each mine that there would be no basis on which any general wage scales could be predicated, collective bargaining would therefore be rendered impossible throughout this industry, and the very purpose of the Fair Labor Standards Act would be defeated. In such an event, it would make necessary the reas-

sembling of the Appalachian Joint Wage Conference and it would be faced with an issue that would be almost impossible of solution by agreement, resulting in an industrial conflict that could paralyze the nation. This would be a most unhappy result to flow from an act that was passed by the Congress to aid workers in industries that had unreasonably long hours and unreasonably low rates of pay, as contrasted with the short hours and the high rates of pay in the bituminous coal mines. The great amount of money involved in the case of extra payment by the operators or the great changes that would be required in the rates of pay to the miners, should any change in the present contract be necessary by reason of a new standard for the measurement of time worked, is so serious that a negotiated adjustment would seem to be impossible.

For the foregoing reasons, we believe that your Division should accept the standards of wages and hours of work, and the definition of working time, as set forth in the Appalachian Agreement (which embodies the custom and traditions of the bituminous mining industry), as complying both with the provisions of the Fair Labor Standards Act and of Interpretive Bulletin No. 13, to the effect that "reasonable standards agreed upon between the employer and the employee will be accepted for the purposes of the Act."

We therefore respectfully request that your Division issue a supplement to Interpretive Bulletin No. 13, stating that the standard of wages and hours of work, and definition of working time, set forth in the Appalachian Agreement, entered into on May 12, 1940, between twenty-three district associations of bituminous coal operators comprising the Appalachian coal producing area and the International Union, United Mine Workers

of America, and the several district agreements based thereon, conform to and satisfy the requirements of the Wage & Hour Act.

Respectfully submitted,

For the United Mine Workers of America:

(S) EARL E. HOUCK,
Director of the Legal Department.

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Appalachian Joint Conference
Negotiating Committee.

(27)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

Number 969

LOCAL No. 6167
UNITED MINE WORKERS OF AMERICA,
AN UNINCORPORATED ASSOCIATION
AFFILIATED WITH THE INTERNATIONAL
UNION, UNITED MINE WORKERS
OF AMERICA, ET AL.,

Petitioners

Versus

JEWELL RIDGE COAL CORPORATION,
A CORPORATION,

Respondent

BRIEF OF COUNSEL FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. JURISDICTION

Petitioners appealed this case to the Circuit Court of Appeals, Fourth Circuit, but without awaiting that Court's action, which could have been had at its June term, petitioned this Court to grant certiorari.

That this Court has authority under section 240 (a) of the Judicial Code, 28 U. S. C. A., section 347, to grant the requested writ before the Circuit Court of Appeals has passed upon the case is undeniable. It is equally undeniable that its right to do so has been most sparingly exercised. Here in support of prayer for extraordinary action the importance of the litigation is urged. Respondent would

quickly concede the full measure of importance ascribed to the case, but queries whether that very importance does not argue in favor of allowing the case to follow the usual course in order that this Court, if and when it takes cognizance of the case, will have the benefit not only of the District Court's findings and judgment but as well of a full review by the Circuit Court of Appeals for the Fourth Circuit.

The public interest is cited as warrant for bypassing the Circuit Court of Appeals. Petitioners have fomented such interest among their own large membership and have given such wide currency to the slogan by which they have labeled this litigation that the assertion of public interest cannot be disputed. But pressure of popular clamor is an inappropriate accompaniment for prayer for extraordinary judicial action. And certainly it could be said that the sort of public interest here involved might best be served by requiring this case to follow the orderly and usual course through the Courts. Respondent is unwilling to recognize in the reasons assigned by Petitioners for granting the writ any suggestion that the national supplies of a vital commodity are in any way threatened.

These considerations are addressed to the sound discretion of this Court. Respondent recognizes the right of Petitioners to have the findings and judgment of the District Court in this case reviewed, and stands equally ready to meet the issue in this Court or in the Circuit Court of Appeals, where the case now is.

II. STATEMENT OF THE CASE

In the *Muscoda Case* (*Tennessee Coal Iron & Railroad Company v. Muscoda Local No. 123, etc., et al.*, No. 409, decided March 27, 1944, 88 L.Ed. 610), this Court

held that the underground travel time of iron ore mine workers was properly included within their workweek under the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C. A. Sec. 201.

In the present case the question is whether the underground travel time of bituminous coal mine workers *must*, by force of the Act, be included in the workweek—whether there *must* be a change from the traditional 'face-to-face' basis of pay, under which a man has been understood to be at work as soon as he got to his usual working place and his pay started then and continued until he finished his shift at his assigned place, to the 'portal-to-portal' basis, under which a man is regarded as being at work and his pay starts when he enters the portal of the mine and continues, less an agreed period for lunch, until he leaves the mines without regard to the time spent at his usual working place.

III. ARGUMENT

In their "Summary and Short Statement of the Matters Involved," petitioners have accurately stated the formal issues and how they were developed and decided. But in their "Statement as to Operations of the Mines" they have failed to portray fairly the factual setting for those issues. They say that there is no dispute in the evidence as to a single essential feature of the mining operations, and yet their statement as to operations is in striking contrast with the description of the same operations contained in the District Court's findings. The Court listened to a parade of witnesses who, in giving bit by bit a picture of these mine operations, differed as diametrically as the positions now before this Court. The District Judge had to evaluate all of that evidence, and, according to the credibility of the witnesses, the reasonableness of the testimony and soundness of the explanations, decide the issues presented. It is

obvious that in doing so he had to draw upon all those tests, those powers of perception and judgment, which dictate the strong presumption in favor of the findings by that Court who has seen the witnesses and heard their testimony.

In their statement, as in the trial, petitioners have attempted to make the tail wag the dog in this, that, whereas the real issue is whether the time spent in riding or walking to their working places in the mines *must*, by force of the Act, be included in the employee's workweek, they on the other hand have placed disproportionate emphasis upon the few minutes spent by certain of the employees in pre-portal activity. The most of the men "don't have anything to do" before entering the mine (R. 515), "just a few of the Company men" (R. 516). They are under no supervision (R. 505, 516), and the things those men do consume on an average from three to ten minutes (R. 506, 546). The trial Court, following the Circuit Court of Appeals for the Fifth Circuit in the *Muscoda Case*, 135 F. 2d. 320, found that these activities, which occur before the employee reports for work (R. p. 218), "fall within the category of duties incident to qualifying the employee to perform his work rather than within the scope of his actual employment" (R. p. 563).

Petitioners state the facts of the present case as nearly as possible in line with those of the *Muscoda Case*, setting out points of similarity and ignoring points of difference, and then summarize the result under the heading "Decision of the District Judge" (petition, p. 12) as follows:

> "The District Judge did not make any finding of facts contrary to the facts above enumerated."

This statement is considerably less than fair. The District Court considered the facts found in the *Muscoda Case*, and

found that they were not only different from, but were the exact converse of, the corresponding facts in the present case on the four cardinal points (R. pp. 565-7):

1. The administrative ruling,
2. The established usage throughout the industry,
3. The situation in respect of collective bargaining,
4. The conditions and facts of underground travel in respondent's mines.

We here set out the distinctions.

1. The Administrative Ruling.

In the *Muscoda Case* the Administrator of the Wage and Hour Division, charged with the enforcement of the Fair Labor Standards Act, had issued an official ruling that the portal-to-portal basis was applicable in the iron ore mines, and he intervened as a party, presented evidence, filed briefs and made arguments in the case in support of that position. In the present case, he had issued an official ruling and decision to the precise contrary, fully upholding the 'face-to-face' basis as against the 'portal-to-portal' basis, and did not intervene in the case, though he kept in touch with the proceedings by having his attorney present informally at all stages of the case, as stated by the Court (R. p. 559). Petitioners ignore the administrative ruling.

2. The Established Usage Throughout the Industry.

The facts found in the *Muscoda Case* were that while plaintiff in that case contended

> "that the custom has always and universally been such as to exclude any payment for the time spent by

underground iron ore employees in walking and being transported to and from their usual working places***** The evidence has disclosed no such custom." *Muscoda Case,* D. C., 40 F. S. 4, 7.

In the present case the Court found that

"the evidence shows beyond question that, in the bituminous coal industry in this country, for the past fifty years, travel time of underground workers has not been considered work time. By the NIRA Code for the bituminous coal industry, travel time was definitely excluded from work time. By the precise terms of all subsequent contracts between plaintiff and defendants, and between employers and employees generally in the bituminous coal industry, travel time has been excluded from work time." (R. p. 569).

3. The Situation In Respect Of Collective Bargaining.

In the *Muscoda Case* the Court found that

"the methods of payment of wages were dictated almost entirely by the employers. The employees worked on the best terms they could obtain . . . It cannot be said that the way in which the iron ore miners have received their pay established, with their free and uncoerced agreement, the proposition that the time in question is not worktime." 40 F. S. 4, 8.

In the present case the Court found that

"here, we have the word of both the operators and the Union, that as to the 'face-to-face' basis, 'this method of measuring the worktime at the place of work. . . is the result of collective bargaining in its complete sense'" (R. p. 566)

and that

"the record in this case by no means discloses 'a pitiable picture of helplessness against the domination

> of the mining companies'; on the contrary, the record here does disclose the picture of the 'strong and powerful' union. . . (R. p. 567).

Summarizing the results of fifty years of usage and collective bargaining, petitioner United Mine Workers of America, united in a letter (known as the "Houck letter") under date of July 9, 1940, to the Wage and Hour Division stressing the serious effects upon the bituminous coal mining industry which would result if the Act were construed to require a change from the 'face to face' basis to the portal-to-portal basis, in which the following statements were made (R. pp. 667-671):

> "The Appalachian Wage Agreement is the basic agreement for the bituminous mines in the State of Pennsylvania, Ohio, West Virginia, Virginia, Eastern Kentucky, Southeastern Tennessee and Maryland."
>
> . . . . . .
>
> The United Mine Workers of America and coal operators of the United States have been negotiating wage agreements for a period of fifty years. The Appalachian Agreement, covering as it does a great number of men and mines, has been worked out over that period of time and covers within its general provisions myriad wage rates, conditions of work, and hours of employment. . . . . .
>
> "There are many reasons why the provision as to working time has been set out as provided by this agreement. The impracticability of measuring time by any other method is inherent in the very nature of mining coal. . . . . .
>
> "Hence, travel time was never considered as a part of the agreement or obligation of the employer to pay for in this industry, nor as hours worked by

the employees, and this has been the case since the eight-hour day was established in the industry—April 1, 1898. . . . . .

(If the Division should rule that the Act requires a change to the "portal-to-portal" basis), "collective bargaining would therefore be rendered impossible throughout this industry, and the very purpose of the Fair Labor Standards Act would be defeated. . . . . .

"For the foregoing reasons, we believe that your Division should accept the standards of wages and hours of work, and the definition of working time, as set forth in the Appalachian Agreement (which embodies the custom and traditions of the bituminous mining industry), as complying both with the provisions of the Fair Labor Standards Act and of Interpretive Bulletin No. 13, to the effect that 'reasonable standards agreed upon between the employer and the employee will be accepted for the purposes of the Act.' "

Confirming the statements of the "Houck letter" as to the effects to be anticipated from the impostion of a rigid portal-to-portal basis on the long-range future of the industry, as distinct from temporary non-competitive wartime conditions, O'Neill, a distinguished figure in the industry, testified as follows (R. pp. 144-5):

"This condition that we are getting into here now is going to change the relationship between mines, between districts, and the whole competitive situation that we have had in this industry for fifty years is being revolutionized by this thing called portal-to-portal pay, and it is being done, in my opinion, without consideration of its consequences at all, or perhaps, may I say with a recklessness that shouldn't be in an industry like this at a time like this. I think

that every statement contained in the (Houck) letter will be proven to be correct, under that War Labor Board's decision, in a very short time. I think the industry and the United Mine Workers will, as competitive conditions return, have to back away from this portal-to-portal thing in order to insure the maintenance of competition between operators and to insure maintenance of work for their own people."

The face-to-face basis for measuring working time has been fixed immemorially by "custom, tradition and contract provision" (R. p. 670) in the industry.

The District Court found that petitioner's present contention that the Act requires a change to the portal-to-portal basis was not advanced until petitioner's efforts to obtain a wage increase in 1943 on some other basis had been prevented by the national wage stabilization regulations. The Court said: (R. pp. 552-3):

"The United Mine Workers Union has never in any way contended that travel time was work time under the Fair Labor Standards Act until the Wage Conference of March, 1943, and only contended for it then as an additional basis for its demand for a general wage increase to all mine workers, both inside and outside the mines.

. . . . . .

"Thus, the 1943 demand of the Union is actually a demand for a flat wage increase to all mine workers, whether or not they spend any time traveling underground to their usual places of work, and not truly a contention that the Fair Labor Standards Act requires inclusion of the actual travel time as work time for those who have actual travel time underground."

The petitioners ignore the collective bargaining history,

the Houck letter, and the circumstances which evoked the Union's present contention for the portal-to-portal basis.

4. The Conditions and Facts Of Underground Travel in Respondent's Mines.

This Court has summarized findings 15 to 27 of the District Court in the *Muscoda Case* dealing with the facts and conditions of underground travel in the iron ore mines, saying:

> "The exacting and dangerous conditions in the mine shafts stand as mute, unanswerable proof that the journey from and to the portal involves continous physical and mental exertion as well as hazards to life and limb. And this compulsory travel occurs entirely on petitioners' property and is at all times under their strict control and supervision."

The District Court in the present case summarized the difference between the findings in the *Muscoda Case* and what the evidence showed in the present case with regard to the facts and conditions of underground travel in the respective mines involved as follows (R. p. 567):

> "Fourth, there the court found that the underground travel was under conditions peculiar to the mining of iron ore which were replete with hazards, highly uncomfortable and requiring physical exertion, due largely to over-crowding of cars and which were unpleasant and disagreeable because of bad odors, heat and poor ventilation, and were burdensome to those encountering them. Here, although I have not found that the 'mantrips' constituted pleasure excursions, I have found no such painful and burdensome conditions as those described in the iron ore mines."

The District Court also found (R. pp. 546-7):

> "Transportation for employees by mantrips is necessary for the successful operation of the mines. They constitute a benefit to both employer and employees. They benefit the company in promoting safety, orderliness and increased productiveness: they benefit the employees by saving their time and energy, and thus increase their productiveness. . . .
>
> "No work or labor is required of employees while riding on mantrips, and supervision is limited to the enforcement of safety rules and regulations. Those riding on mantrips sit upright where the roof is high enough, but find it necessary to bend over where the roof is low. Riding on mantrips, while definitely not luxurious, is neither painful nor unduly uncomfortable, and is less hazardous than other phases of mining operation."

With regard to supervision, the employees are subject to no more supervision or requirements on mantrips than they are during the lunch period (R. p. 241).

It is to be noted that the "Safety Rules and Regulations" which are enforced on mantrips are those promulgated by the public authorities, and in enforcing them the foreman in charge of the mantrip discharges a function corresponding to that of a conductor on a railway passenger train (R. p. 226).

Petitioners exaggerate the hazards of the mantrips. The serious accidents mentioned in the petition (p. 11) did not occur on mantrips, but during work (R. pp. 482, 526). Since January 1, 1939, respondent has operated 12,115 mantrips (i. e. trains of cars transporting employees to or from work) per compensable accident.

5. The Interpretation of the Act.

The District Court reviewed the legislative history of the Act and found therefrom as a fact that (R. p. 558):

> "It was neither the intent of Congress nor the desire of the Union, in the enactment of the Fair Labor Standards Act of 1938, to interfere in any way with the wage structure of the bituminous coal industry."

The position taken by petitioner United Mine Workers of America before the congressional committees at the hearings preceding the enactment, as stated and endorsed in the present case by the important Union official and witness Tetlow, was quoted by the Court as follows (R. p. 558):

> ". . . . the miners' organization has always taken the position that the question of wages, hours and conditions of employment should be governed and controlled by agreements under collective bargaining in the industry more so than by legislation. Fundamentally, we are opposed to legislation that controls daily wage and conditions of employment. We think that is a relationship that should exist between employer and employee."

Obviously, the question whether bituminous coal miners should be paid on the basis of face-to-face or portal-to-portal had, prior to the Act, resided wholly in the field of collective bargaining. The District Court, in the present case, had before him the duty of determining whether Congress by the Act had removed that question from the field of contract to that of status, thus reversing Maine's famous dictum. The Court, after employing the aids to construction presented by the record, concluded that it was the intention of Congress to leave the issue as between face-to-

face and portal-to-portal in the field of contract, where it had found it. This conclusion is supported by the administrative ruling, the familiar and established usage in the industry to which all parties continued to adhere without demur after the enactment, the common agreement of the parties expressed in the long history of collective bargaining, the legislative history of the Act, and the facts of underground travel in respondent's mines.

This Court said in the *Muscoda Case*:

> "In the absence of a contrary legislative expression, we cannot assume that Congress here was referring to work or employment other than as these words are commonly used. . . . . ."

It cannot be gainsaid that "as these words are commonly used" in the bituminous coal mining industry they have not included the time used in travel to and from the usual working places of the respective employees. Nor can it be said that the evidence in this case shows any such requirements of physical or mental effort on the part of the underground workers before they arrive at their accustomed working places as to make clearly wrong the finding of the District Court that they were not at work during the travel time.

IV. CONCLUSION

It therefore follows that the findings and judgment of the District Court should stand and this petition be denied.

Respectfully submitted,

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